NORFOLK & P. B. L. R. CO. *v.* STURGIS.

June 10, 1915.

[85 S. E. 572.]

1. Master and Servant (§ 256*)—Pleading (§ 8*)—Injuries to Servant—Actions—Complaint—Sufficiency.—In view of Code 1904, arts. 3246, 3272, declaring that no action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed on the merits, and that on demurrer the court shall not regard any defect unless there be omitted something essential to the action, a complaint alleging that plaintiff was assigned to duty on a locomotive under the orders of the engineer, that the locomotive was out of repair, that plaintiff was ordered to draw water from the spigot of the water tank and pass it to the engineer to extinguish the fire, and that, while standing with one foot on the step leading to the cab, and the other on the bumper of the tender, in a position which became one of great peril if the locomotive were suddenly backed, the engineer, though he knew or should have known of plaintiff's position without warning, backed the locomotive upon the tender, injuring plaintiff, states a good cause of action; the averments as to plaintiff's position of peril not being mere conclusions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256; Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.* 11 Va.-W. Va. Enc. Dig. 217; 14 Va.-W. Va. Enc. Dig. 831; 15 Va.-W. Va. Enc. Dig. 808.]

2. Trial (§ 253*)—Instructions—Ignoring Issue.—In an action by a fireman who was crushed when the engine was moved against the tender from which he was drawing water, an instruction that, if plaintiff, without negligence on his part, was in a position which made injury to him a necessary consequence of backing the engine, and the engineer knew or ought to have known of plaintiff's position, it was his duty to warn plaintiff before backing the engine, unless plaintiff knew of such attempt, and that, if the engineer backed the engine without such warning, then plaintiff is entitled to recover, is not objectionable on the ground that it fails to set forth defendant's theory of the case, which was that the engineer did not know plaintiff had unnecessarily placed himself in a position of peril.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.* 7 Va.-W. Va. Enc. Dig. 715; 14 Va.-W. Va. Enc. Dig. 562; 15 Va.-W. Va. Enc. Dig. 512.]

3. Trial (§ 267*)—Instructions—Modification.—It was not error for the court to modify defendant's requests which presented the defense that plaintiff voluntarily took a position of peril by explanatory aver-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ments involving the knowledge of the engineer of plaintiff's position of peril.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.* 7 Va.-W. Va. Enc. Dig. 709; 14 Va.-W. Va. Enc. Dig. 562; 15 Va.-W. Va. Enc Dig. 512.]

4. Appeal and Error (§ 1002*)—Review—Verdicts.—A verdict on conflicting evidence will be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.* 1 Va.-W. Va. Enc. Dig. 470; 14 Va.-W. Va. Enc. Dig. 59; 15 Va.-W. Va. Enc. Dig. 52.]

Error to Circuit Court, Norfolk County.

Action by John R. Sturgis against the Norfolk & Portsmouth Belt Line Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Thos. H. Willcox, of Norfolk, for plaintiff in error.

W. H. Venable and *R. E. Miller,* both of Norfolk, for defendant in error.

MAHONEY et al. *v.* FRIEDBERG et al.

June 10, 1915.

[85 S. E. 581.]

Deeds (§ 114*)—Construction—Reservation.—The owner of land which abutted on a creek conveyed lots adjacent to the creek, bounding them by the port warden's line in the creek as then or thereafter it might be established. At that time the port warden's line had been established, and thereafter land was added to these lots by accretion. It appeared that at the time of the conveyance the port warden's line marked the bank of the creek. Held that, as a deed is to be construed most strictly against the grantor, the conveyance must be held to include the grantor's riparian rights, if any, under the bed of the creek.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.* 4 Va.-W. Va. Enc. Dig. 420; 14 Va.-W. Va. Enc. Dig. 321; 15 Va.-W. Va. Enc. Dig. 270.]

Appeal from Circuit Court of City of Norfolk.

Bill by Mary R. Mahoney and others against Solomon Freidberg and others. From a decree for defendants, plaintiffs appeal. Affirmed.

G. M. Dillard, of Norfolk, for appellants.

John B. Jenkens, G. Tayloe Gwathmey, and *W. A. Graff,* all of Norfolk, for appellees.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.